

1
2
3
4
5
6
7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
9

10 DIANE CROSS,

11 Plaintiff,

12 v.

13 HFLP - DOLPHIN BEACH, LLC,

14 Defendant.
15
16
17
18
19

Case No.: 15CV2506-MMA (DHB)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANT'S
MOTION TO DISMISS AND
MOTION TO STRIKE;**

[Doc. No. 40]

**DENYING DEFENDANT'S MOTION
FOR SANCTIONS; AND**

[Doc. No. 44]

**DENYING PLAINTIFF'S MOTION
FOR SANCTIONS**

[Doc. No. 47]

20
21 Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant
22 HFLP - Dolphin Beach, LLC moves to dismiss Plaintiff Diane Cross's Third Amended
23 Complaint ("TAC"), which alleges claims for violations of the Americans with
24 Disabilities Act of 1990 ("ADA"), 42 U.S.C. 12101 *et seq.*, the Fair Housing Act and the
25 Fair Housing Amendments Act (collectively, the "FHA"), 42 U.S.C. §§ 3600 *et seq.*, and
26 California's Unruh Civil Rights Act, California Civil Code § 51 *et seq.* See Doc. No. 40.
27 Defendant also moves to strike or dismiss Plaintiff's state law claims. See Doc. No. 40.
28 Each party also moves for sanctions under Federal Rule of Civil Procedure 11. See Doc.

Nos. 44, 47. The Court found these matters suitable for determination on the papers and without oral argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** Defendant's motion to dismiss and to strike, Doc. No. 40, **DENIES** Defendant's motion for sanctions, Doc. No. 44, and **DENIES** Plaintiff's motion for sanctions, Doc. No. 47.

PROCEDURAL HISTORY

On October 9, 2015, Plaintiff commenced this action in the Superior Court for the State of California, County of San Diego, case number 37-2015-00034063-CU-CR-CTL, against Defendant. On November 5, 2015, Defendant removed the case to this Court. On November 20, 2015, Defendant filed a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), alleging the Court lacked subject matter jurisdiction over the action. Doc. No. 2. However, Plaintiff subsequently filed the First Amended Complaint ("FAC"),¹ which superseded the original complaint, and rendered moot Defendant's motion to dismiss the original Complaint. *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). The FAC included claims for violations of the ADA, the FHA, and California's Unruh Civil Rights Act.

Defendant then filed a motion to dismiss the FAC, which the Court granted. *See* Doc. No. 13. The Court dismissed Plaintiff's ADA claims without prejudice pursuant to Rule 12(b)(1) on the grounds that Plaintiff had not sufficiently alleged standing. Specifically, the Court found Plaintiff failed to sufficiently allege a "real and immediate threat of repeated injury," as required in ADA cases where injunctive relief is the only remedy available to private plaintiffs. *See* Doc. No. 13; *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 944 (9th Cir. 2011). Additionally, the Court dismissed without prejudice Plaintiff's FHA claims pursuant to Federal Rule of Civil Procedure 8, concluding that Plaintiff's allegations did not provide Defendant with adequate notice of

¹ Pursuant to Federal Rule of Civil Procedure 15(a)(1)(B), "[a] party may amend its pleading once as a matter of course within . . . 21 days after service of a motion under Rule 12(b)" Plaintiff filed her amended pleading within 21 days of service of Defendant's motion to dismiss.

1 her claims or their grounds. The Court declined to address Plaintiff's claims arising
2 under California law at that stage. The Court allowed Plaintiff to amend claims
3 dismissed without prejudice.

4 Subsequently, Plaintiff filed a Second Amended Complaint ("SAC"), and
5 Defendant moved to dismiss the SAC. Before the Parties completed briefing on
6 Defendant's motion to dismiss, Plaintiff filed a motion for leave to file a Third Amended
7 Complaint ("TAC"). The Court granted Plaintiff's motion, and denied Defendant's
8 motion to dismiss as moot. *See* Doc. No. 38. Plaintiff filed the TAC, and Defendant now
9 moves to dismiss Plaintiff's federal claims pursuant to Rules 12(b)(1) and 12(b)(6), and
10 moves to strike Plaintiff's state law claims pursuant to California law. *See* TAC, Doc.
11 No. 39; Doc. No. 40. Nearly two months later, Defendant filed a motion for sanctions
12 pursuant to Federal Rule of Civil Procedure 11. *See* Doc. No. 44. Soon after, Plaintiff
13 also filed a Rule 11 motion for sanctions. *See* Doc. No. 47. After multiple scheduling
14 conflicts regarding the hearing date for the pending motions, the Court set a special
15 briefing schedule and took all matters under submission on the papers. *See* Doc. No. 46.

16 **BACKGROUND**²

17 In the TAC, Plaintiff alleges Defendant owns, operates, and/or leases Dolphin
18 Beach Apartments, located at 662 Tamarack Avenue in Carlsbad, California. Plaintiff
19 states that she suffers physical impairments that render her unable to walk and require her
20 to use a wheelchair. Plaintiff also alleges she has impaired vision, and has a "companion
21 service dog." *See* TAC, ¶ 53.

22 "On or about September 15 2015," Plaintiff alleges she went to Dolphin Beach
23 Apartments "to utilize their goods and/or services." *See* TAC, ¶ 10. Plaintiff alleges she
24 "went to the Defendants' [sic] subject property to obtain an application to lease a rental
25 unit" and "to determine if the general accessibility of the property would be accessible to
26 _____

27 ² Because this matter is before the Court in part on a 12(b)(6) motion to dismiss, the Court must accept
28 as true the allegations set forth in the operative complaint. *See Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425
U.S. 738, 740 (1976).

1 Plaintiff if she were to successfully obtain a rental unit.” *See* TAC, ¶ 10. However,
2 Plaintiff contends that when she arrived, “she was denied equal access to and had
3 difficulty using the public accommodations’ facilities.” *See* TAC, ¶ 10. Specifically,
4 Plaintiff alleges Defendant has a rental office at the location of the apartments. Plaintiff
5 alleges Defendant did not have “the required compliant Van Accessible disabled parking
6 space or regular disabled parking space” or the requisite signage for such parking spaces,
7 which caused Plaintiff to have a difficult time parking because she risked being precluded
8 from exiting or reentering her vehicle if someone else parked improperly. *See* TAC, ¶ 11.
9 Further, “there was a high step at the entrance threshold to the leasing office and an office
10 doorway that was too narrow to be accessible.” *See* TAC, ¶ 11. Also, the door to the
11 office “has a round door knob that [she] is unable to twist due to her disability.” *See*
12 TAC, ¶ 11. Accordingly, Plaintiff alleges she “is unable to enter the leasing office.” *See*
13 TAC, ¶ 11. Finally, Plaintiff alleges the rental units were inaccessible “since they had a
14 high threshold.” *Id.*

15 Plaintiff contends she returned to the property on June 14, 2016 to find the same
16 barriers, and thus was deterred from visiting the property in October 2015, November
17 2015, February 2016, and is presently deterred from visiting because of the above-
18 described barriers. She states that she plans to return to Defendant’s facilities “on August
19 12, 2016 to obtain leasing application materials.” *See* TAC, ¶ 14. The TAC alleges
20 Plaintiff intends to return on October 14, 2016 “for the same reason,” on August 18,
21 2017, and at the conclusion of this litigation to verify that it is accessible and to “obtain
22 rental applications and leasing information.” *See* TAC, ¶¶ 14. Plaintiff states that she
23 currently “resides in a rental unit located approximately only Twenty-Seven (27) miles”
24 from the subject property and is in the “immediate area of Defendant’s property at least
25 once a month.” *See* TAC, ¶ 14. She alleges that she “has been searching for a new rental
26 facilities [sic] prior to September 2015 due to her impending departure from her current”
27 unit. *See* TAC, ¶ 14. She states that her “current leasehold was originally to terminate in
28 January 2016.” *See* TAC, ¶ 14. Plaintiff alleges she would like to move into that area, if

1 not into a unit at Defendant's property. *See* TAC, ¶ 14.

2 Also, around September 2015, Plaintiff states she went online in order to determine
3 whether Defendant had any apartments available to rent, and to assess the accessibility of
4 Defendant's facilities and apartments. *See* TAC, ¶ 10. Plaintiff contends "Defendants'
5 [sic] Internet advertising uses selective media or content exclusively to cater to the
6 majority population without disabilities." *See* TAC, ¶ 50. Plaintiff lists webpages on
7 which "Defendant advertises the subject property," such as, "yelp.com, yellowpages.com,
8 carlsbad-ca.abcd4.com, apartmentcloud.org, [and etcetera]." *See* TAC, ¶ 51. On a
9 couple of the websites, Plaintiff states that "the equal housing opportunity logo" appears.
10 *See* TAC, ¶ 51. Plaintiff also alleges "the said advertising uses catch words, symbols or
11 logotypes and colloquialisms that suggest a preference for people without disabilities,"
12 and "the selective placement of the equal housing opportunity logo" also suggests such a
13 preference. *See* TAC, ¶ 50. "For example," the TAC alleges, "Defendants advertise
14 statements such as it is only a walking distance to Carlsbad Village, restaurants, cafes,
15 stores, Jefferson Elementary School, High Schools, parks, etc." *See* TAC, ¶ 52. Also,
16 the TAC alleges "[s]ome advertisements say the property was built in 1994 and others
17 state 1970." *See* TAC, ¶ 52. Plaintiff states:

18
19 Defendants [sic] internet advertises that the property has
20 amenities that include off street parking, private balcony/patio,
21 dishwasher, refrigerator, range, spacious closets, walk in closet,
22 new bathrooms, cabinets, counter tops, sinks, fans, new flooring
23 throughout the unit, oven, garbage disposal, refrigerator, washer
& dryer hookup, wall heater and 12 months lease term.

24 *See* TAC, ¶ 52. Additionally, the TAC alleges Defendant advertises that "[i]t is a pet
25 friendly community," and "has a pet policy, but it does not state whether Defendant's
26 policy makes an exception for companion or service dogs." *See* TAC, ¶ 53. "Further,"
27 Plaintiff alleges, "none of the human models used in the said advertising have a known
28 disability." *See* TAC, ¶ 50. The advertisements also allegedly "show access barriers

1 without any reasonable accommodation notice.” *See* TAC, ¶ 53. Lastly, Plaintiff
2 contends “Defendant’s internet website [notices, statements, and advertisements] are not
3 accessible visually since one is not able to click and increase the [] font size to make it
4 more readable for persons with impaired vision.” *See* TAC, ¶ 54.

5 Based on the foregoing allegations, the TAC alleges claims for violations of the
6 ADA, FHA, and California’s Unruh Civil Rights Act.

7 LEGAL STANDARD

8 **A. Rule 12(b)(1)**

9 Pursuant to Rule 12(b)(1), a party may seek dismissal of an action for lack of
10 subject matter jurisdiction “either on the face of the pleadings or by presenting extrinsic
11 evidence.” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003);
12 *see also White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Where the party asserts a
13 facial challenge, the court limits its inquiry to the allegations set forth in the complaint.
14 *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). “If the challenge to
15 jurisdiction is a facial attack . . . the plaintiff is entitled to safeguards similar to those
16 applicable when a Rule 12(b)(6) motion is made.” *San Luis & Delta-Mendota Water*
17 *Auth. v. U.S. Dep’t of the Interior*, 905 F. Supp. 2d 1158, 1167 (E.D. Cal. 2012) (internal
18 citation and quotation omitted). “Lack of standing is a defect in subject-matter
19 jurisdiction and may be properly challenged under Rule 12(b)(1).” *Wright v. Incline*
20 *Village Gen. Imp. Dist.*, 597 F. Supp. 2d 1191, 1199 (D. Nev. 2009) (citing *Bender v.*
21 *Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)).

22 **B. Rule 12(b)(6)**

23 A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint. *Navarro*
24 *v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). A pleading must contain “a short and plain
25 statement of the claim showing that the pleader is entitled to relief” Fed. R. Civ. P.
26 8(a)(2). However, plaintiffs must also plead “enough facts to state a claim to relief that is
27 plausible on its face.” Fed. R. Civ. P. 12(b)(6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,
28 570 (2007). The plausibility standard thus demands more than a formulaic recitation of

1 the elements of a cause of action, or naked assertions devoid of further factual
2 enhancement. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Instead, the complaint “must
3 contain allegations of underlying facts sufficient to give fair notice and to enable the
4 opposing party to defend itself effectively.” *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir.
5 2011).

6 In reviewing a motion to dismiss under Rule 12(b)(6), courts must assume the truth
7 of all factual allegations and must construe them in the light most favorable to the
8 nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337–38 (9th Cir. 1996).
9 The court need not take legal conclusions as true merely because they are cast in the form
10 of factual allegations. *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).
11 Similarly, “conclusory allegations of law and unwarranted inferences are not sufficient to
12 defeat a motion to dismiss.” *Pareto v. FDIC*, 139 F.3d 696, 699 (9th Cir. 1998).

13 In determining the propriety of a Rule 12(b)(6) dismissal, courts generally may not
14 look beyond the complaint for additional facts. *United States v. Ritchie*, 342 F.3d 903,
15 908 (9th Cir. 2003). “A court may, however, consider certain materials—documents
16 attached to the complaint, documents incorporated by reference in the complaint, or
17 matters of judicial notice—without converting the motion to dismiss into a motion for
18 summary judgment.” *Id.*; see also *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.
19 2001). Where dismissal is appropriate, a court should grant leave to amend unless the
20 plaintiff could not possibly cure the defects in the pleading. See *Knappenberger v. City*
21 *of Phoenix*, 566 F.3d 936, 942 (9th Cir. 2009).

22 **C. Rule 11**

23 Federal Rule of Civil Procedure 11 provides in pertinent part, that when an
24 attorney or unrepresented party presents a signed paper to a court, that attorney or
25 unrepresented party is certifying that to the best of his or her “knowledge, information
26 and belief, formed after an inquiry reasonable under the circumstances” that:

27
28 (1) it is not being presented for any improper purpose, such as to harass, cause

- 1 unnecessary delay, or needlessly increase the cost of litigation;
2 (2) the claims, defenses, and other legal contentions are warranted by existing law
3 or by a nonfrivolous argument for extending, modifying, or reversing law or for
4 establishing new law; [and]
5 (3) the factual contentions have evidentiary support or, if specifically so identified,
6 will likely have evidentiary support after a reasonable opportunity for further
7 investigation or discovery[.]

8 *See* Fed. R. Civ. P. 11(b)(1)–(3).

9 When one party seeks sanctions against another, a court must first determine
10 whether any provision of Rule 11(b) has been violated. *Warren v. Guelker*, 29 F.3d
11 1386, 1389 (9th Cir. 1994). A finding of subjective bad faith is not required under Rule
12 11. *See Smith v. Ricks*, 31 F.3d 1478, 1488 (9th Cir. 1994) (“Counsel can no longer
13 avoid the sting of Rule 11 sanctions by operating under the guise of a pure heart and
14 empty head.”). “Instead, the question is whether, at the time the paper was presented to
15 the Court (or later defended) it lacked evidentiary support or contained ‘frivolous’ legal
16 arguments.” *Odish v. CACH, LLC*, 2012 WL 5382260, at *3 (S.D. Cal. Nov. 1, 2012). If
17 the court determines a Rule 11 violation occurred, “the court *may* impose an appropriate
18 sanction on any attorney, law firm, or party that violated the rule or is responsible for the
19 violation.” Fed. R. Civ. P. 11(c)(1) (emphasis added).

20 DISCUSSION

21 **A. Defendant’s Motion to Dismiss**

22 Defendant moves to dismiss Plaintiff’s ADA claim pursuant to Rule 12(b)(1) on
23 the grounds that Plaintiff fails to establish standing. Defendant moves to dismiss
24 Plaintiff’s FHA claims pursuant to Rules 12(b)(6) and 8 on the grounds that Plaintiff’s
25 allegations do not provide Defendant with adequate notice of the basis for her FHA
26 claims. Lastly, Defendant moves to strike Plaintiff’s Unruh Civil Rights Act claims on
27 the basis that, under California law, the TAC must be verified.

28 //

//

1 **i. Defendant's Notice of Lodgment**

2 As an initial matter, with Defendant's motion to dismiss, Defendant submits a
3 "Notice and Lodgment" including more than 550 pages of documents. *See* Doc. No. 40-
4 1. Specifically, Defendant attaches documentation regarding the number of cases
5 Plaintiff has filed in various jurisdictions, copies of complaints filed by Plaintiff in other
6 cases, copies of Plaintiff's original Complaint and First Amended Complaint in the
7 instant case, a document purporting to provide directions from an address in Carlsbad,
8 California to an address in Riverside, California, and an article regarding serial ADA
9 litigation. *See* Doc. No. 40-1.

10 In Defendant's "Notice," Defendant does not describe for what purposes
11 Defendant submits these documents, except that they are lodged "in connection with and
12 in support of Defendant's Motion to Dismiss." *See* Doc. No. 40-1. On a motion to
13 dismiss pursuant to Rule 12(b)(6), the Court is generally limited to the allegations of the
14 operative complaint, and must accept those allegations as true. *See Ritchie*, 342 F.3d at
15 908. Defendant does not argue that the documents are part of, or incorporated by
16 reference in, the TAC, or are proper matters for judicial notice. Accordingly, the Court
17 declines to consider any of Defendant's proffered documents for the purposes of its
18 motion to dismiss under Rule 12(b)(6).³

19 On the other hand, the Court may consider extrinsic evidence in ruling on a motion
20 to dismiss for lack of standing pursuant to Rule 12(b)(1). *See Warren v. Fox Family*
21 *Worldwide, Inc.*, 328 F.3d 1136, 1141, n.5 (9th Cir. 2003). As discussed below,
22 however, the Court declines to consider any of Defendant's documents for Defendant's
23 proffered purposes in attacking Plaintiff's standing.

24 Lastly, based on the foregoing, the Court also **OVERRULES** Plaintiff's
25 evidentiary objections to Defendant's documents as moot.

26
27
28 ³ However, insofar as Defendant seeks to rely on Plaintiff's prior pleadings in the instant action for any purposes, the Court need not take judicial notice of such filings.

1 **ii. Plaintiff's ADA Claims**

2 Defendant moves to dismiss Plaintiff's ADA claims pursuant to Rule 12(b)(1) for
3 lack of standing. Plaintiffs alleging violations of the ADA must demonstrate that they
4 have Article III standing by showing that they have suffered "an injury-in-fact, that the
5 injury is traceable to the [defendant's] actions, and that the injury can be redressed by a
6 favorable decision." *Chapman*, 631 F.3d at 946 (citing *Fortyone v. Am. Multi-Cinema,*
7 *Inc.*, 364 F.3d 1075, 1081 (9th Cir. 2004)). Further, because injunctive relief is the only
8 remedy available to private plaintiffs alleging ADA violations, plaintiffs must also
9 demonstrate a "real and immediate threat of repeated injury." *Id.* The Ninth Circuit has
10 held there are two ways in which a plaintiff can satisfy this requirement. *Id.* at 949. A
11 plaintiff "can show a likelihood of future injury when he intends to return to a
12 noncompliant accommodation and is therefore likely to reencounter a discriminatory
13 architectural barrier." *Id.* at 950. Or, a plaintiff can show that the "discriminatory
14 architectural barriers deter him from returning to a noncompliant accommodation." *Id.*

15 In the Court's previous Order granting Defendant's motion to dismiss the FAC, the
16 Court concluded that Plaintiff failed to plausibly allege deterrence or a likelihood of
17 future harm to establish standing. Specifically, in the FAC, Plaintiff merely stated that
18 she visited Defendant's property to use Defendant's "goods and/or services," that she
19 intended to return, and that she was presently deterred from returning. Plaintiff stated
20 that she "has a close connection with most locations within California," but admitted to
21 living nearly 30 miles from Defendant's property. *See* Doc. Nos. 7, 13. Based on the
22 nature of Defendant's property, and Plaintiff's lack of context and conclusory allegations,
23 the Court concluded Plaintiff did not plausibly allege actual deterrence or a genuine
24 intent to return.

25 On the other hand, in the TAC, Plaintiff clarifies that she went to Defendant's
26 property to inquire about available rental properties and that she is continuing to look for
27 available and accessible apartments. She states an intent to return to Defendant's
28 property in the future to explore the possibility of renting a unit. Accordingly, Plaintiff

1 cures her pleadings’ prior deficiencies regarding standing, and pushes her allegations
2 regarding future intent across the line from speculative to plausible. *See McCarn v.*
3 *HSBC USA, Inc.*, No. 1:12-CV-00375 LJO, 2012 WL 7018363, at *3 (E.D. Cal. May 29,
4 2012) (stating that pleadings must “plausibly suggest[]” “the existence of standing”).⁴

5 Defendant’s arguments to the contrary are unpersuasive. Defendant argues that
6 Plaintiff’s pleadings are insufficient to show a plausible intent to return because (1)
7 Plaintiff is allegedly a serial ADA litigant, and (2) the allegations of the TAC are at odds
8 with previous versions of Plaintiff’s pleadings—particularly, the original Complaint,
9 which Plaintiff verified under penalty of perjury.

10 Regarding Defendant’s first grounds, Defendant calls into question Plaintiff’s
11 credibility based on Plaintiff’s litigation history. Presumably in support of this argument,
12 Defendant has lodged documents illustrating the number and nature of other cases that
13 Plaintiff has filed. However, the Ninth Circuit has explicitly condemned a district court’s
14 reliance on a plaintiff’s ADA litigation history in order to “question the sincerity of her
15 intent to return to” the property at issue. *See D’Lil v. Best W. Encina Lodge & Suites*,
16 538 F.3d 1031, 1040 (9th Cir. 2008) (“[B]ecause the district court focused on D’Lil’s
17 history of ADA litigation as a basis for questioning the sincerity of her intent to return to
18 the Best Western Encina, we reject its purported adverse credibility determination.”); *cf.*
19 *Molski v. Evergreen Dynasty Corp.*, 500 F.3d 1047, 1062 (9th Cir. 2007) (“For the ADA
20 to yield its promise of equal access for the disabled, it may indeed be necessary and
21 desirable for committed individuals to bring serial litigation advancing the time when
22 public accommodations will be compliant with the ADA.”). Thus, it is inappropriate for
23 the Court to rely on Defendant’s extrinsic documents for Defendant’s proffered purpose,
24 and the Court declines to discount Plaintiff’s credibility based on her other litigation.

25 Regarding Defendant’s second grounds for dismissal of Plaintiff’s ADA claims,
26

27
28 ⁴ A plaintiff must plead standing in accordance with the Federal “*Twombly/Iqbal* standard.” *See*
McCarn, 2012 WL 7018363, at *3.

1 the Court is unpersuaded that Plaintiff has necessarily contradicted herself in the TAC as
2 compared with Plaintiff's verified⁵ original Complaint. In Plaintiff's original Complaint,
3 Plaintiff stated that she "is also a tester as Plaintiff Cross desires to determine if the
4 Defendants [sic] are complying with the housing and access laws and will continue to do
5 so after this case is completed." See Compl., Doc. No. 1-2, ¶ 2. Defendant specifically
6 takes issue with Plaintiff's use of the term "tester." See Compl., ¶ 2. Defendant urges the
7 Court to find that this statement is directly contradicted by Plaintiff's allegation in the
8 TAC that she visited Defendant's property as a potential renter. Defendant argues that
9 Plaintiff cannot be both a tester and a prospective tenant because "the law defines testers
10 as 'individuals who, without an intent to rent or purchase a home or apartment, pose as
11 renters or purchasers for the purpose of collecting evidence of unlawful steering
12 practices.'" See Doc. No. 40 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363,
13 373 (1982)).

14 Essentially, Defendant asks the Court to infer facts that are absent from Plaintiff's
15 Complaint, based solely on her use of the word "tester." In other words, Plaintiff's
16 original Complaint did not include facts that would support Defendant's legal definition
17 of a tester. For example, Plaintiff did not allege that she had no intent to rent, or inquire
18 about renting, an apartment. Rather, the Complaint only stated that Plaintiff was a tester
19 in that she desired to determine whether Defendant's facilities were compliant with
20 certain laws, and also that Plaintiff visited the facilities for their goods or services. Thus,
21 to adopt Defendant's argument, the Court would have to read into Plaintiff's Complaint
22 facts which did not appear therein—namely, that Plaintiff had *no* intent to rent or inquire
23

24
25 ⁵ A verified complaint may have evidentiary value as an affidavit. See *Schroeder v. McDonald*, 55 F.3d
26 454, 460 (9th Cir. 1995) (stating that if based on personal knowledge and setting forth admissible facts,
27 "[a] verified complaint may be used as an opposing affidavit" for purposes of summary judgment);
28 *Klian v. Crawford*, No. CV1202373MMMJEMX, 2012 WL 12878721, at *2 (C.D. Cal. June 6, 2012)
("A verified complaint can, if based on personal knowledge, serve as the equivalent of an affidavit for
purposes of a motion to dismiss for lack of personal jurisdiction.").

1 about renting a unit. The Court declines to do so.⁶ Consequently, Plaintiff's allegations
2 are not in direct conflict. It is not impossible for Plaintiff to have had both the intent to
3 inquire about renting a unit, and the intent to "test" the accessibility of the facilities.

4 Based on the foregoing, the Court **DENIES** Defendant's motion to dismiss
5 Plaintiff's ADA claims. *See* Doc. No. 40.

6 Lastly, because Defendant's motion for sanctions under Rule 11 is based solely on
7 Defendant's second grounds for dismissal, the Court also **DENIES** Defendant's motion
8 for sanctions. *See* Doc. No. 44. Specifically, because the Court disagrees with
9 Defendant's contention that in filing the TAC, Plaintiff "flatly contradicted" her
10 allegations in the verified original Complaint, the Court does not conclude that Plaintiff
11 filed the TAC for an improper purpose, in bad faith, or that the TAC is clearly
12 unsupported by the evidence. *See* Doc. No. 44.

13 **iii. Plaintiff's FHA Claims**

14 Plaintiff asserts three causes of action under the FHA: (1) violation of section
15 3604(f)(1); (2) violation of section 3604(f)(2); and (3) violation of section 3604(c).⁷ *See*
16 Doc. No. 39. In Defendant's motion to dismiss, Defendant makes no mention of
17 Plaintiff's claims under sections 3604(f)(1) and (2). Rather, Defendant focuses solely on
18 Plaintiff's 3604(c) claim, arguing that Plaintiff fails to allege any notices, statements, or
19 advertisements attributable to Defendant that indicate a discriminatory preference. In
20 Defendant's reply brief, Defendant argues that the Court should also dismiss Plaintiff's
21

22 ⁶ Further, "[t]he tenet that a court must accept as true all of the allegations contained in a complaint is
23 inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L.
24 Ed. 2d 868 (2009). Even if treated as an affidavit, the Court would not accept legal conclusions in the
25 Complaint as true or infer absent factual allegations to support those legal conclusions. *See Lew v. Kona*
26 *Hosp.*, 754 F.2d 1420, 1423 (9th Cir. 1985) (disregarding legal conclusions in a verified complaint as
having no bearing on a summary judgment motion); *see Daghlan v. TBI Mortg. Co.*, No. CV-12-01415-
PHX-NVW, 2013 WL 179452, at *8 (D. Ariz. Jan. 17, 2013).

27 ⁷ Defendant argues it cannot liable for violating 24 C.F.R. section 109 because that section was
28 "eliminated from the CFR in 1996." *See* Doc. No. 40. However, while the TAC cites extensively to that
regulation, Plaintiff does not allege a cause of action for violation of that section. Further, Plaintiff
acknowledges that section 109 is "no longer independently operative." *See* Doc. No. 48.

1 3604(f) claims on the grounds that Plaintiff admits that she saw Defendant's property
2 under construction and accordingly, Plaintiff does not know whether the barriers she
3 alleges to have encountered still exist.

4 **a. Plaintiff's Section 3604(c) Claim**

5 Regarding Plaintiff's section 3604(c) claim, Defendant moves for dismissal
6 pursuant to Rule 12(b)(6) on the grounds that "Plaintiff has not alleged sufficient facts to
7 in any way notify the Defendant what advertisements are in supposed violation of the
8 FHA, or why." *See* Doc. No. 40. Section 3604 of the FHA states, in pertinent part:

9 [I]t shall be unlawful— . . . (c) To make, print, or publish, or
10 cause to be made, printed, or published any notice, statement,
11 or advertisement, with respect to the sale or rental of a dwelling
12 that indicates any preference, limitation, or discrimination
13 based on race, color, religion, sex, handicap, familial status, or
14 national origin, or an intention to make any such preference,
limitation, or discrimination.

15 *See* 42 U.S.C. § 3604. Although a plaintiff need not show discriminatory intent, a
16 plaintiff must point to a statement that suggests to the "ordinary" listener or reader a
17 discriminatory preference. *See Llanos v. Estate of Coehlo*, 24 F. Supp. 2d 1052, 1057
18 (E.D. Cal. 1998); *Lee v. Retail Store Employee Bldg. Corp.*, No. 15-CV-04768-LHK,
19 2017 WL 346021, at *15 (N.D. Cal. Jan. 24, 2017). To establish a claim under section
20 3604(c), a plaintiff must demonstrate "(1) that [the] defendant made a statement, (2) that
21 statement was made with respect to the sale or rental of a dwelling, and (3) the statement
22 indicated a preference, a limitation, or discrimination against the plaintiff on the basis of"
23 their protected status. *See United States v. Hadlock*, No. CV 08-3074-CL, 2010 WL
24 331772, at *4 (D. Or. Jan. 27, 2010) (citing *White v. HUD*, 475 F.3d 898, 904 (7th Cir.
25 2007)).

26 Here, Plaintiff fails to delineate a single notice, statement, or advertisement that an
27 ordinary person would conclude conveys a discriminatory preference. For example,
28 Plaintiff alleges Defendant's "selective placement of the equal housing opportunity logo"

1 “suggests a preference for people without disabilities.” *See* TAC, ¶ 51. It is unclear why
2 use of the equal housing opportunity logo on some advertisements, or the lack of the logo
3 on others, would convey a discriminatory preference for tenants without disabilities. *See*
4 *Green v. California Court Apartments, LLC*, No. C07-334-MJP, 2008 WL 681835, at *4
5 (W.D. Wash. Mar. 10, 2008), *aff’d*, 321 F. App’x 589 (9th Cir. 2009) (dismissing the
6 plaintiff’s claim that the defendant violated section 3604(c) by failing to “post notice of
7 the [existence of the] Fair Housing Act”).

8 Further, Plaintiff states that other advertisements state that the apartment complex
9 is within walking distance to certain locations in Carlsbad, and that the complex includes
10 various amenities such as “off street parking, private balcony/patio, dishwasher,
11 refrigerator, range, spacious closets, walk in closet, new bathrooms, cabinets, counter
12 tops, sinks, fans, new flooring throughout the unit, oven, garbage disposal, refrigerator,
13 washer & dryer hookup, wall heater and 12 months lease term.” *See* TAC, ¶ 52. Again,
14 the Court is unable to conclude that such statements “indicate[] a preference, a limitation,
15 or discrimination” against individuals with disabilities, such as Plaintiff.

16 Plaintiff also alleges none of the advertisements contain models with disabilities,
17 but Plaintiff does not describe any advertisements as containing any models. Further,
18 Plaintiff complains that Defendant advertises that it has a “pet policy,” but that
19 Defendant’s advertisement does not explicitly state that it allows service and companion
20 animals. An ordinary reader would not interpret such an omission as discriminatory
21 toward those with companion animals, and the concept that an omission may constitute a
22 notice, statement, or advertisement is tenuous. *See Green* 2008 WL 681835, at *4
23 (“Because section 3604(c) does not apply to non-existent publications, Plaintiffs have not
24 stated a claim on which relief may be granted.”). Lastly, Plaintiff does not point the
25 Court to any authority or case law to support her contention that Defendant’s
26 advertisements or notices violate section 3604(c).

27 For the foregoing reasons, the TAC fails to describe any publication or statement
28 attributable to Defendant which would convey to the ordinary reader an unlawful

1 preference for tenants without disabilities. As such, the Court **GRANTS** Defendant's
2 motion to dismiss, and **DISMISSES** Plaintiff's claim under 42 U.S.C. § 3604(c) with
3 prejudice.⁸

4 **b. Plaintiff's Section 3604(f) Claims**

5 Regarding Defendant's request for dismissal of Plaintiff's claims under sections
6 3604(f)(1) and (2), Defendant makes its request for the first time in its reply brief. "It is
7 improper for a moving party to introduce new facts or different legal arguments in the
8 reply brief than those presented in the moving papers." *O'M & Assocs., LLC v. Ozanne*,
9 No. 10CV2130 AJB RBB, 2011 WL 2160938, at *6 (S.D. Cal. June 1, 2011) (quoting
10 *United States ex rel. Giles v. Sardie*, 191 F. Supp. 2d 1117, 1127 (C.D. Cal. 2000));
11 *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir. 2007) ("The district court need not
12 consider arguments raised for the first time in a reply brief."). The Court could disregard
13 Defendant's request on those grounds alone.

14 Nevertheless, the Court is unpersuaded by Defendant's proffered grounds for
15 dismissal. Defendant argues Plaintiff's claims should be dismissed because Plaintiff
16 stated, in a declaration submitted in support of her brief in opposition to Defendant's
17 motion for sanctions, that she visited Defendant's property and saw it under construction.
18 Consequently, Defendant argues Plaintiff "cannot honestly argue she has any idea
19 whether the architectural barriers she ostensibly saw remain at the property, or whether
20 they are now remedied, immediately mooted any claim for injunctive relief and any
21 possibility of future damages." *See* Doc. No. 51.

22 Although Defendant does not state whether it moves to dismiss such claims
23 pursuant to Rule 12(b)(6) or 12(b)(1), the Court infers that Defendant moves to dismiss
24 Plaintiff's section 3604(f) claims under Rule 12(b)(1) because Defendant relies on the
25

26 ⁸ Dismissal with prejudice is appropriate because the Court has already provided Plaintiff with the
27 opportunity to amend this claim, and Plaintiff has failed to cure the deficiencies of her claim. Further,
28 amendment would be futile because Plaintiff states in the TAC that she "downloaded and reviewed"
"all" of Defendant's advertisements online. *See* TAC ¶ 50. Accordingly, Plaintiff would not be able to
amend to allege any advertisements not already included in the TAC.

1 doctrine of mootness and on extrinsic evidence.⁹ While a Rule 12(b)(6) motion is
2 generally limited to the complaint, “[a] jurisdictional challenge under Rule 12(b)(1) may
3 be made either on the face of the pleadings or by presenting extrinsic evidence.” *See*
4 *Local Search Ass’n v. City & Cty. of San Francisco*, No. C 11-2776 SBA, 2013 WL
5 450845, at *2 (N.D. Cal. Feb. 4, 2013) (quoting *Warren v. Fox Family Worldwide, Inc.*,
6 328 F.3d 1136, 1139 (9th Cir.2003)). Thus, the Court considers the declaration that
7 Defendant relies on. In Plaintiff’s declaration, she merely states that, on August 12,
8 2016, “the property was undergoing construction activity.” *See* Doc. No. 49-2. Plaintiff
9 does not provide any information regarding the nature or specific location of the
10 construction. Therefore, Plaintiff does not state that the construction she observed related
11 to any of the architectural barriers described in the TAC.

12 Further, even assuming Plaintiff has somehow admitted that she is not certain the
13 alleged barriers still exist, the Court rejects the proposition that where a plaintiff is not
14 certain that architectural barriers underlying his or her claims still exist at some point
15 after a complaint is filed, the plaintiff’s claims are instantly moot. In other words,
16 Defendant does not argue that because it has remedied the alleged architectural barriers,
17 Plaintiff’s claims are moot.¹⁰ Rather, Defendant argues Plaintiff’s claims are moot
18 because Plaintiff may not know with certainty that any alleged architectural barriers
19 currently exist. The Court is unaware of, and Defendant does not cite to, any case within
20 this Circuit that stands for such a proposition.¹¹

22 ⁹ “Standing, ripeness and mootness all pertain to a federal court’s subject matter jurisdiction under
23 Article III, and are appropriately raised in a motion under Rule 12(b)(1).” *Local Search Ass’n v. City &*
24 *Cty. of San Francisco*, No. C 11-2776 SBA, 2013 WL 450845, at *2 (N.D. Cal. Feb. 4, 2013).

25 ¹⁰ If that were the case, Defendant would have a much stronger argument. *See Dodson v. Joseph*
26 *Esperanca, Jr., LLC*, No. 2:12-CV-02132-TLN, 2013 WL 6328274, at *2 (E.D. Cal. Dec. 4, 2013) (“A
27 defendant’s voluntary removal of alleged barriers can have the effect of mooting a plaintiff’s ADA
28 claim.”). But, Defendant would still bear a heavy burden. Even where a defendant “claim[s] that its
voluntary compliance moots a case,” the defendant “bears [a] formidable burden of showing that it is
absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.” *See*
Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000).

¹¹ In fact, Defendant does not cite to any legal authority to support its argument.

1 For the above reasons, the Court **DENIES** Defendant's request that the Court
2 dismiss Plaintiff's FHA claims arising under sections 3604(f)(1) and (2).

3 **iv. Plaintiff's Unruh Civil Rights Act Claims**

4 Lastly, Defendant moves to strike Plaintiff's Unruh Civil Rights Act claims on the
5 grounds that the California Code of Civil Procedure requires that Plaintiff file verified
6 complaints, and the TAC is not verified. "The California legislature has modified the
7 pleading requirements for complaints alleging construction-related accessibility claims by
8 requiring plaintiffs to allege" with heightened specificity their encounters with alleged
9 barriers, and "to verify the complaint." *See Oliver v. In-N-Out Burgers*, 286 F.R.D. 475,
10 477 (S.D. Cal. 2012); Cal. Code Civ. P. § 425.50. "A complaint filed without
11 verification shall be subject to a motion to strike." *See* Cal. Code Civ. P. § 425.50(b)(1).

12 In Defendant's motion to dismiss, Defendant provides no legal argument or case
13 support for its contention that Plaintiff's state law claims "are subject to a Motion to
14 Strike" or "fail as a matter of law" because the TAC is unverified. *See* Doc. No. 40.
15 Instead, Defendant merely makes the request that the Court strike Plaintiff's state law
16 claims on those grounds. *See* Doc. No. 40.

17 In response, Plaintiff cites to several district court cases in this Circuit in which the
18 courts rejected similar arguments on the grounds that California procedural law does not
19 apply in federal court under the *Erie* doctrine. *See* Doc. No. 48; *Erie R. Co. v. Tompkins*,
20 304 U.S. 64 (1938). Plaintiff also argues that if she were required to comply with section
21 425.50, she would have to verify her entire complaint, meaning that Plaintiff's federal
22 ADA and FHA claims would also be subject to an otherwise nonexistent pleading
23 requirement. Additionally, Plaintiff argues that, in similar situations, courts in this
24 Circuit have concluded that other requirements of the Unruh Civil Rights Act—such as
25 the requirement that courts impose mandatory stays and hold early evaluation
26 conferences—were preempted by the ADA. *See* Doc. No. 48 (citing *Lamark v. Laiwalla*,
27 No. CIV. 2:12–3034 WBS AC, 2013 WL 3872926 (July 25, 2013), for example).

28 In Defendant's reply brief, Defendant responds that many of the cases that Plaintiff

1 relies on are nonbinding, unpublished district court cases, and do not specifically address
2 the verification requirement. Also, Defendant extrapolates some on the grounds for its
3 contention that Plaintiff's state law claims must be stricken. Defendant acknowledges for
4 the first time that the *Erie* doctrine controls whether section 425.50 applies to this action.
5 Defendant notes that the Third and Tenth Circuits have concluded that two state statutes,
6 which both required plaintiffs in certain professional liability cases to file certificates of
7 merit after filing the complaint, applied to cases in federal court.¹² Further, Defendant
8 states that the Ninth Circuit has addressed a similar situation to the one at hand in *U.S. ex*
9 *rel. Newsham v. Lockheed Missiles & Space Co.*, in which the Ninth Circuit held that the
10 California Anti-SLAPP statute, which allows parties to move to strike state law claims in
11 some instances, applies to state law claims in federal court. *See* Doc. No. 51 (citing
12 *Newsham*, 190 F.3d 963 (9th Cir. 1999)). Defendant concludes that, although *Newsham*
13 does not address the particular statute at hand, "it does indicate that the 9th Circuit is
14 inclined to uphold against the rigors of *Erie* statutes which provide additional procedures
15 and safeguards to protect defendants against potentially meritless litigation." *See* Doc.
16 No. 51.

17 As an initial matter, Defendant improperly raises new arguments and law for the
18 first time in its reply brief. In Defendant's motion, Defendant does not make any
19 arguments as to why a provision of the California Code of Civil Procedure would apply
20 to the instant action, nor cite to or discuss the *Erie* doctrine. Defendant did not cite to any
21 cases until its reply brief, depriving Plaintiff of the chance to respond to Defendant's
22 reliance on those cases. As discussed above, it is inappropriate for parties to raise new
23 legal arguments in their reply briefs, and district courts may disregard such arguments.
24 *See Stickle v. SCI W. Mkt. Support Ctr., L.P.*, No. 08-083-PHX-MHM, 2009 WL
25 3241790, at *4 (D. Ariz. Sept. 30, 2009) (stating that "[c]onsistent with long-standing

27
28 ¹² But, Defendant also admits that the Eleventh Circuit has come to the opposite conclusion in a similar case.

1 Ninth Circuit case law, this Court will deem as waived any substantive legal arguments
2 made for the first time in a reply brief”). “Each time the moving party is permitted to
3 raise new arguments or present new evidence in reply . . . the non-moving party is
4 essentially deprived of the opportunity to address these new contentions.” *Id.*

5 Further, even considering the arguments in Defendant’s reply brief, Defendant, as
6 the moving party, fails to make any showing as to why application of section 425.50
7 would be proper under *Erie*. In fact, aside from acknowledging the relevance of the *Erie*
8 doctrine in Defendant’s reply brief, Defendant does not address any of the considerations
9 of an *Erie* analysis. “*Erie* has come to stand for the general principle that ‘federal courts
10 sitting in diversity apply state substantive law and federal procedural law.’” *In re Cty. of*
11 *Orange*, 784 F.3d 520, 527 (9th Cir. 2015) (quoting *Gasperini v. Ctr. For Humanities,*
12 *Inc.*, 518 U.S. 415, 427 (1996)). Accordingly, pleading requirements are typically
13 governed by federal procedural law. “When confronted with an *Erie* question, we first
14 ask whether a Federal Rule of Civil Procedure or a federal law governs.” *Id.* “If so, we
15 will apply that rule—even in the face of a countervailing state rule.” *Id.* Defendant does
16 not explain why the Court should not just apply Federal Rules of Civil Procedure 8 and
17 12, which govern pleading, and Rule 11, which states that pleadings generally need not
18 be verified.

19 Even assuming the Federal Rules of Civil Procedure do not alone govern pleading,
20 Defendant does not address whether section 425.50 is procedural or substantive. “Absent
21 an applicable Federal Rule or law, [courts] apply the ‘relatively unguided’ *Erie* analysis,
22 which calls on [courts] to determine whether the rules at issue are substantive or
23 procedural,” and which can be “a challenging endeavor.” *Id.* (internal citations omitted).
24 “[T]here is no bright line distinguishing substance from procedure, [and] the meanings of
25 these terms shade into one another by degrees and vary from context to context.” *Id.*
26 (quoting Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L.Rev. 547, 569
27 (1996)). Defendant does not argue section 425.50 is substantive and in fact, Defendant
28 describes the rule as procedural several times throughout its briefing. *See* Doc. No. 40, at

1 3, n.1, 4:5–6; Doc. No. 51, at 4:16–17.

2 Further, in situations where it is not readily apparent whether a rule is substantive
3 or procedural, courts apply the “outcome-determination test,” under which courts inquire:
4 “does [the rule] significantly affect the result of a litigation for a federal court to
5 disregard a law of a State that would be controlling in an action upon the same claim by
6 the same parties in a State court?” *See Gasperini*, 518 U.S. at 427 (citing *Guaranty Trust*
7 *Co. v. York*, 326 U.S. 99 (1945)). This test must be applied with *Erie*’s “twin aims” in
8 mind: “discouragement of forum-shopping and avoidance of inequitable administration
9 of the laws.” *See id.* at 428. Defendant does not address how the considerations of the
10 outcome-determination test or the twin aims of *Erie* apply to this case.

11 Lastly, the Supreme Court has stated that the “outcome-determination” test is “an
12 insufficient guide in cases presenting countervailing federal interests.” *Id.* (citing *Byrd v.*
13 *Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525 (1958)). Defendant does not address
14 whether there are countervailing federal interests. Further, Plaintiff contends that she
15 would have to verify her entire complaint, including federal claims, in order to comply
16 with section 425.50. Plaintiff is correct in that section 425.50(b)(1) insinuates that the
17 entire complaint must be verified. *See* Cal. Code Civ. P. § 425.50. Thus, countervailing
18 federal interests may be implicated if plaintiffs are required to verify federal claims as
19 well as Unruh Civil Rights Act claims in federal court. Defendant does not respond to
20 Plaintiff’s argument.

21 In sum, Defendant does not make the requisite showing that it would be
22 appropriate under *Erie* and its progeny to apply section 425.50(b)(1) to this action. The
23 Court finds it imprudent to undertake a full *Erie* analysis in the absence of adequate
24 briefing. Further, the only other Courts to have addressed whether any provisions of
25 section 425.50 apply in federal court have concluded that they do not. *See, e.g., Schoors*
26 *v. Seaport Vill. Operating Co., LLC*, No. 16CV3089-AJB-BGS, 2017 WL 1807954, at *3
27 (S.D. Cal. May 5, 2017); *Strong v. Johnson*, No. 16CV1289-LAB (JMA), 2017 WL
28 201737, at *3 (S.D. Cal. Jan. 18, 2017); *Oliver*, 286 F.R.D. at 477; *Saavedra v. Chu.*, No.

1 517CV00607ODWEX, 2017 WL 2468779, at *1 (C.D. Cal. June 7, 2017).

2 Based on the foregoing, the Court **DENIES** Defendant's motion to strike or
3 dismiss Plaintiff's Unruh Civil Rights Act claims.

4 **B. Motions for Sanctions**

5 Both parties move for sanctions pursuant to Rule 11. *See* Doc. Nos. 44, 47. As
6 discussed above, the Court **DENIES** Defendant's motion for sanctions.

7 In support of Plaintiff's motion for sanctions, Plaintiff argues Defendant's motion
8 for sanctions violates Rule 11. In particular, Plaintiff argues that Defendant's motion for
9 sanctions is frivolous because Defendant disputes Plaintiff's motive for being on
10 Defendant's property, and she is not required to plead her "subjective motive" for being
11 there. Plaintiff also argues that Defendant's motion for sanctions is duplicative and
12 presented for an improper purpose because Defendant's motion is based on the same
13 argument that Defendant had already raised in arguing Plaintiff's ADA claims should be
14 dismissed for lack of standing.

15 As a preliminary matter, after Plaintiff filed her reply brief in support of her motion
16 for sanctions, Defendant filed a supplemental document¹³ arguing that Plaintiff's reply
17 brief is untimely and should be stricken. *See* Doc. No. 54. In response to Defendant's
18 supplemental document, Plaintiff filed an *ex parte* motion requesting that the Court
19 consider Plaintiff's reply brief. *See* Doc. No. 55. Plaintiff filed her reply brief on
20 Monday, February 20, 2017, which was a federal holiday. *See* 5 U.S.C. § 6103(a)
21 (stating that the third Monday in February is Washington's Birthday). Accordingly,
22 pursuant to Civil Local Rule 7.1(e)(3), Plaintiff was required to file her reply brief on or
23 before Friday, February 17, 2017. While Defendant is correct that Plaintiff should have
24 filed her reply brief on the Friday prior to the Court holiday, the Court considers
25 Plaintiff's reply brief in the interests of justice. Generally, public policy favors

26
27 ¹³ Defendant titled the document "Reply – Other." *See* Doc. No. 54. The Court notes that, in the future,
28 any document which requests the Court strike a pleading must be filed as a motion—either *ex parte* or
fully noticed.

1 disposition of cases on their merits. *See Hernandez v. City of El Monte*, 138 F.3d 393,
2 399 (9th Cir. 1998). Accordingly, the Court **GRANTS** Plaintiff's *ex parte* motion, Doc.
3 No. 55, and turns to the merits of Plaintiff's motion for sanctions.

4 First, while the Court denies Defendant's motion for sanctions, the Court does not
5 find the motion frivolous. A filing is frivolous if it "is both baseless and made without a
6 reasonable and competent inquiry." *See Townsend v. Holman Consulting Corp.*, 929
7 F.2d 1358, 1362 (9th Cir. 1990). Defendant's stance that the TAC contradicted prior
8 verified allegations is not frivolous, despite that the Court declines to adopt Defendant's
9 theory that it should read into Plaintiff's Complaint Defendant's proffered legal definition
10 of "tester." Further, the Court does not find Defendant filed its motion for sanctions for
11 an improper purpose. While based on the same grounds, Defendant seeks different relief
12 in Defendant's motion for sanctions, as compared with Defendant's motion to dismiss.
13 Accordingly, the Court does not find Defendant's motion was filed to improperly
14 multiply the proceedings. Thus, the Court **DENIES** Plaintiff's motion for sanctions.

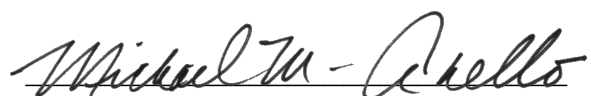
15 In sum, the Court declines to exercise its discretion to impose sanctions on either
16 party. *See Hilo v. BP Expl. & Oil*, 108 F.3d 337 (9th Cir. 1997) ("Rule 11 makes the
17 imposition of sanctions discretionary.").

18 CONCLUSION

19 Based on the foregoing, the Court **GRANTS IN PART** and **DENIES IN PART**
20 Defendant's motion to dismiss and motion to strike Plaintiff's claims in the TAC. *See*
21 Doc. No. 40. The Court **DENIES** Defendant's motion for sanctions, and **DENIES**
22 Plaintiff's motion for sanctions. *See* Doc. Nos. 44, 47.

23 **IT IS SO ORDERED.**

24
25 Dated: June 28, 2017

26 

27 Hon. Michael M. Anello
28 United States District Judge